IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NO. 48

SWITCHMEN'S UNION OF NORTH AMERICA, In its own right, etc., T. C. CASHEN, et al.,

Petitioners,

vs.

NATIONAL MEDIATION BOARD, GEORGE A. COOK, WILLIAM M. LEISERSON, et al.

BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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OPINIONS BELOW

The District Court rendered no opinion. It issued findings of fact and conclusions of law, which appear at R. 76-81.

The opinion of the Court of Appeals for the District of Columbia is reported in 135 F (2d) 785, and appears

at R. 160-181, and a dissenting opinion by Mr. Justice Rutledge appears at R. 181-193.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1943. The petition for certiorari was filed on April 16, 1943, and was granted May 24, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

STATUTE INVOLVED

This case involves the Railway Labor Act, as amended in 1934, 48 Stat. 1185, 45 U.S.C. §151, *et seq.*, the pertinent provisions of which are set forth in the Appendix, *infra*.

STATEMENT

The New York Central Railroad Company was established in 1914. It was formed through a consolidation of the New York Central & Hudson River Railroad and the Lake Shore & Michigan Southern Railway, which operated lines from New York City to Chicago. That portion of the New York Central west of Buffalo has since been commonly known as Lines-West, while that portion east of Buffalo has been commonly known as Lines-East. The New York Central Railroad Company also operates the lines of several separate lessor or subsidiary corporations under long-term leases or controlling stock ownership. The companies whose lines are thus operated include the Boston & Albany, the Cleveland, Cincinnati, Chicago & St. Louis (Big Four), the Michigan Central and the Toledo & Ohio Central. (R. 33, 34, 76, 77.)

This case arose out of an alleged dispute over whether

the yardmen working in certain yards of the New York Central Railroad Company were legally entitled to representation by the Switchmen's Union of North America (hereinafter referred to as the Switchmen's Union), one of the petitioners, or by the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood), one of the respondents. At the time the dispute was investigated by the National Mediation Board (hereinafter referred to as the Board), and for many years before, the yardmen employed on the New York Central were represented and working under agreements negotiated by either the Switchmen's Union or the Brotherhood. (R. 150-152) The Switchmen's Union was the accepted representative of yardmen in all yards on the Michigan Central lines west of the Detroit River (including the South Bend Transfer Crews) and in all yards of the New York Central-Lines West (of Buffalo) except nine yards covered by Brotherhood contracts. The Brotherhood represented yardmen in all yards of the Michigan Central east of the Detroit River (these being in Canada), all yards of the Boston & Albany, the New York Central-Lines East (of Buffalo), the Big Four and the Toledo & Ohio Central Lines. There was no question raised by the Switchmen's Union or by anyone else concerning the right of the Brotherhood to represent yardmen covered by Brotherhood contracts. (R. 34, 35, 79, 80.)

On July 2, 1940, the Brotherhood invoked the services of the Board to investigate an alleged dispute among New York Central yardmen, and claimed the right to represent all yardmen employed by the New York Central Railroad Company.[1] The Brotherhood contended that *all* the yardmen employed by the com-

[1] With its application the Brotherhood presented to the Board signed authorizations from 4,749 out of approximately 6,087 yardmen employed by the Company. (R. 35, 79.)

pany should be voted for the purpose of selecting a single representation. (R. 27-31.)

The Switchmen's Union opposed the demand of the Brotherhood, contending as follows:

> 1. That no one was disputing the right of the Brotherhood to represent the yardmen covered by its contracts and that, therefore, those yardmen were not involved in any dispute over representation;
>
> 2. That there was no evidence that any specific number of yardmen covered by the Switchmen's Union contracts desired any different representation and that, therefore, there was no basis for holding an election;
>
> 3. That, in any event, only the yardmen covered by the Switchmen's Union contracts could be regarded as "involved" in any dispute; and that the Board was authorized only "to take a ballot of the employees involved" in a dispute. (R. 29-32)

The Board held, however, that, as a matter of law, it was required to vote all the employees of a single carrier working in one craft whenever a dispute arose among some of the craft workers over their representation. (R. 46.) It held that the New York Central Railroad Company was a single carrier and that, accordingly, since a dispute had arisen over the representation of some of the yardmen employed by this carrier, *all* the yardmen must be voted in an election which would determine one representation for all such employees. (R. 27-47.)

It was obvious that if the ruling of the Board were correct the Switchmen's Union could no longer represent its members, even in yards on parts of the railroad system where the overwhelming majority of the yardmen desired representation by the Switchmen's Union. The total number of yardmen employed by the New York Central Railroad Company was approximately

6,087. Disregarding the New York Central-Lines West and the Michigan Central, where a majority of the yardmen were covered by the Switchmen's Union contracts, the Brotherhood contracts covered approximately 3,653 yardmen employed on the Boston & Albany, the New York Central-Lines East, the Big Four and the Toledo & Ohio Central Lines. (R. 35.) It was evident, therefore, at the outset that a majority of *all* the yardmen employed by the New York Central Railroad Company would vote for the Brotherhood. But the Board decided to vote all the yardmen, and conducted an election, despite the protests of the Switchmen's Union, and certified that the Brotherhood had received a majority of the votes (as was inevitable).[2] (R. 47-49.)

Thereupon, the Switchmen's Union filed a bill of complaint (which inaugurated the present case) in the District Court of the United States for the District of Columbia, seeking, first, to enjoin the Board from holding an election, and then, by an amended complaint after the election had been held, seeking to restrain the Brotherhood and New York Central from bargaining and seeking to have the action and certification of the Board annulled and set aside as being without authority and in violation of the provisions of the Act under which the Board purported to act. (R. 3-27.)

The District Court dismissed the complaint on July 10, 1942, after making findings of fact and conclusions of law supporting the action of the Board. (R. 76-81.) Thereupon, an appeal was taken to the United States Court of Appeals for the District of Columbia. While that appeal was pending, the District Court granted the plaintiff's motion for a preliminary injunction pending appeal.

The majority opinion of the Court of Appeals sus-

[2] Of the 7,187 employees eligible to vote, 4,112 voted for the Brotherhood and 941 for the Switchmen's Union. (R. 49.)

tained the position of the Board in holding that the Act compelled the Board to vote all the employees of a craft employed by a single carrier when a dispute arose requiring an election to determine the representation of members of the craft. (R. 160-181.) In his dissenting opinion, Mr. Justice Rutledge took the position that under the Act the Board had the discretion to determine whether or not all the employees of a craft must be voted whenever a dispute arose among some of the employees which required an election to determine their representation. (R. 181-193.)

Thus, there are three possible constructions of the Act presented for the consideration of this Court: (1) that the Act compels the selection of a single representation by all employees of a particular craft who are employed by a single carrier (the majority opinion of the Court of Appeals); (2) that the Act gives the Board a discretion to determine the appropriate or proper unit of employees who may participate in the election (the dissenting opinion of the Court of Appeals); (3) that the Act authorizes the Board to allow only those employees who are "involved in the dispute" to participate in the election, and that the Board cannot arbitrarily include as "employees involved in the dispute" employees who are not, in fact, involved in any dispute over their representation (the contention of petitioners).

Questions Presented

When this Court granted its writ of certiorari in this and three other cases involving the application of the Railway Labor Act,[3] it certified four questions

[3] The other three cases in which this Court granted the petitions for writs of certiorari on May 24, October Term, 1942, were: No. 23—*General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R. Co.*; No. 27—*General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Southern Pacific Company*, and No. 41—*General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen v. General Committee of Adjustments of Brotherhood of Locomotive Engineers.*

for counsel to discuss in their briefs and on oral argument, in so far as such questions were applicable in each case. (R. 196.)

The questions certified by the Court which are applicable to this case are:

> I. What bearing, if any, the Norris-LaGuardia Act has on the propriety of granting the relief sought.
>
> II. Whether the District Court had jurisdiction to review the certification of the Board.

Other questions presented are:

> III. Whether under the facts of this case a dispute existed within the jurisdiction of the Board as conferred in Section 2, Ninth, of the Railway Labor Act.
>
> IV. Whether the Board was *required* by the Railway Labor Act to hold that all employees of a single craft employed by a single operating carrier must be voted to determine a single representation, in situations where, as a matter of fact, a large majority of these employees are satisfied with their representation.

Summary of Argument

I

The Norris-LaGuardia Act is inapplicable to a case of this character. Paragraphs 7 and 8 of the prayer of the complaint are the only parts of the prayer which have not become moot. Paragraph 7 requests the Court to annul and set aside the Board's certification and paragraph 8 seeks to restrain the Brotherhood and New York Central Railroad Company from negotiating or maintaining an agreement on the Michigan Central and New York Central-Lines West.

The Norris-LaGuardia Act as shown by Section 1 seeks only to regulate the issuance of restraining orders and injunctions.

Paragraph 7 is not within the reach of this statute, as it does not seek to restrain or coerce anyone. It asks for relief of a declaratory nature.

The relief prayed for in paragraph 8 falls within the exception to the Norris-LaGuardia Act recognized in the *Virginian* case, *infra*, which held that the Act had no application to an injunction suit to force the carrier to treat with a certified representative in accordance with the requirements of Section 2, Ninth. The basis for the exception to the Act recognized in the *Virginian* case, was the fact that the injunction sought was in furtherance of a specific requirement of the Railway Labor Act, a subsequent enactment. Paragraph 8 is within this exception, as it is in furtherance of Section 2, Fourth, which guarantees employees "the right to organize and bargain collectively through representatives of their own choosing" and provides that "the majority of any craft or class of employees shall have the right to determine who shall be representative of the craft * * *".

The text of the Norris-LaGuardia Act also reveals that it was not intended to apply to cases of this character. Its declared purpose in Section 2 is to protect the employee's right of self-organization. Sections 7 and 9 contain requirements with which it would be impossible to conform in a proceeding of this character. The legislative history is to the same effect.

Courts have entertained many similar suits since the Board was granted powers in the 1934 amendment to determine jurisdictional disputes and there is only one reported case where the Norris-LaGuardia point was raised.

To make the Norris-LaGuardia Act applicable may

well leave an aggrieved labor organization without any adequate judicial remedy in situations like the case at bar.

II

A certificate issued by the Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act, is definitive of rights and duties that are enforceable by the parties affected. The District Court may review such a certification at least to the extent of determining if it is predicated upon an error of law.

The instant suit, in so far as it is one against the Mediation Board and its members, is not a suit against the United States. This being so, decisions of this Court confirm that it was within the District Court's jurisdiction to entertain the suit as to all parties defendant.

III

The jurisdiction of the Board in representative cases is limited to those where a "dispute shall arise among a carrier's employees as to who are the representatives of such employees * * * ". (Sec. 2, Ninth, Railway Labor Act, Appendix, *infra.*)

It is doubtful whether the controversy in this case constituted a dispute within the meaning of the Act.

The real controversy was between the two organizations, namely, the Brotherhood and Switchmen's Union, with the former contending for a single representation for all yardmen on the New York Central Railroad (including the New York Central Railroad-Lines East and Lines West of Buffalo, the Big Four, Michigan Central Railroad Company, the Toledo & Ohio Central Railroad Company, and the Boston & Albany Railroad Company), and the latter for a continuance of representation by separate parts of the New York

Central Railroad as reflected by the contracts of the two organizations then in effect.

The facts show that no one was disputing the right of the Brotherhood to represent yardmen covered by Brotherhood contracts. Nor is there any conclusive evidence to show that yardmen covered by contracts of the Switchmen's Union were disputing the rights of that organization to continue to represent them.

If a representation dispute was presented, it was a dispute as to who was entitled to represent the yardmen on the Michigan Central and New York Central-Lines West who were then covered by switchmen's contracts. It did not involve the yardmen on the other lines of the New York Central, namely, the Boston & Albany Lines, the New York Central-Lines East, the Big Four, and the Toledo & Ohio Central Lines. The yardmen on these lines were represented by the Brotherhood and no one was questioning their representation.

The ruling of the Board was not justified on the basis of Section 2, Fourth, which provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * * ". The words "majority of any craft or class of employees" does not necessarily mean the majority of all the workers in a particular craft who are employed by a single carrier.

The term "craft or class" has no geographical connotation, but refers to employees who perform the same type of work.

The words which are impliedly omitted in Section 2, Fourth, are the following italicized words "the majority of any craft or class of employees" *who are involved in a dispute* "shall have the right to determine who shall be the representative of the craft or class for purposes of this act".

The discretion possessed by the Board is confined to a determination as to what employees are engaged in a dispute and it would be an abuse of discretion to vote employees in an election who are not so involved.

The Board has pursued two diametrically opposite policies in determining what constitutes the bargaining unit. When there is no disagreement, the Board respects the right of self-organization and determines representation disputes on the basis of the bargaining units established theretofore. When the bargaining unit, however, is a matter of dispute, it has been the practice of the Board to treat the unit as carrier-wide.

IV

The action of the Board in voting all of the yardmen of the New York Central Railroad to determine a single representation constituted an unlawful limitation upon the "freedom of association among employees," and an unauthorized interference with the right of employees to designate and bargain collectively through representatives of their own choosing.

The underlying principle written into the act is the right of self-organization.

The practical effect of the ruling of the Board is to destroy this right, as it denies to railroad employees the right to maintain an organization on a railroad and to hold a contract covering a portion of a railroad system, unless that organization desires and is able to extend its membership over the entire system, so that it can at all times command a majority vote of all employees doing similar work.

The act intends that groups which have chosen to bargain as units may continue to do so. This interpretation is clearly supported by the decisions of the Courts.

ARGUMENT

I

THE NORRIS-LaGUARDIA ACT HAS NO BEARING ON THE PROPRIETY OF GRANTING THE RELIEF SOUGHT IN THIS SUIT

This suit is brought by the Switchmen's Union in its own right and by certain of its officers as representatives of the class of yardmen on the Michigan Central Railroad Company and the New York Central-Lines West, against the National Mediation Board, its officers, individually and as members of the Board, the Brotherhood of Railroad Trainmen, and the New York Central Railroad Company. In brief, it complains that the Board and its members acted arbitrarily and unlawfully in combining the yardmen on the New York Central in one bargaining unit for the purpose of choosing a single representative and thereafter in certifying that the BRT had been duly designated as the representative for all the yardmen on the New York Central.

The complaint prays the Court (a) to restrain the Board and its members from certifying the Brotherhood as the duly authorized representative of yardmen on the Michigan Central and New York Central-Lines West (Par. 2 of prayer, R. 24-25); (b) to enjoin the Board from entering an order combining the yardmen employed on the New York Central-Lines West, and on the Michigan Central with the yardmen employed on the balance of the New York Central Company, as a single craft of employees (Par. 3 and 4 of prayer, R. 25); (c) to vacate, annul, and set aside the Board's findings and conclusions of law that the yardmen on the New York Central constitute a single craft and

its order that an election be conducted on that basis (Par. 5 and 6 of prayer, R. 25-26); (d) to annul, vacate, and set aside the Board's certification that the Brotherhood has been duly designated to represent the craft of yardmen on the New York Central (Par. 7, R. 26); and (e) to restrain the Brotherhood and the New York Central Railroad Company from negotiating, entering into, or maintaining an agreement covering working conditions relative to yardmen employed on the Michigan Central and the New York Central Railroad-Lines West. (Par. 8, R. 26.)

The controversy is moot with respect to the relief prayed for in (a), (b) and (c) above, as the action of the Board sought to be restrained has already been taken. The application of the Norris-LaGuardia Act will, therefore, be considered only with respect to the relief requested in (d) and (e).

The Norris-LaGuardia Act (47 Stat. 70, 29 USC §101, *et seq.*) provides in Section 1 that:

> No Court of the United States * * * shall have jurisdiction *to issue any restraining order or temporary or permanent injunction* in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of such sections; nor shall any such restraining order or permanent injunction be issued contrary to the public policy declared in such sections. (Emphasis ours.)

The term "labor dispute" is defined in Section 13 of the Act as including

> * * * any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating * * * conditions of employment * * *.

While the controversy involved in this case may appear to be within the scope of the term "labor dis-

pute",[1] it is submitted that the Norris-LaGuardia Act is inapplicable to a case of this character and particularly to the relief requested in Paragraphs 7 and 8 of the complaint.

Paragraph 7 of the prayer requests the Court to annul, vacate, and set aside the Board's certification. The Norris-LaGuardia Act, as shown by Section 1 thereof, seeks only to regulate the issuance of restraining orders and injunctions. Both its text and history clearly show that it was designed to limit and regulate the granting of orders which sought to coerce or restrain acts. Paragraph 7 does not seek to restrain or coerce anyone. It only requests the Court to annul and vacate the certification complained of. The prayer is declaratory in nature and substantially the same as the judgment which would have been requested had the petitioners denominated their suit a declaratory judgment action. As the Norris-LaGuardia Act admittedly has no application to a declaratory judgment action, it would be unreasonable to hold it applicable to the issuance of decrees granting declaratory relief in an equitable action.

We further believe that the relief prayed for in Paragraph 8 falls within the exception to the Norris-LaGuardia Act recognized in *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515. In this case, it was held that the Norris-LaGuardia Act had no application to an injunction suit to force the carrier to treat with a certified representative in accordance with the requirements of Section 2, Ninth. In sustaining the mandatory injunction which had been granted by the lower court, this Court observed (562-563):

> Petitioner assails the decree for its failure to

[1] See *Fur Workers Union, Local No. 72 v. Fur Workers Union*, 105 F. (2d) 1 (App. D. C.), affirmed, 308 U. S. 537, and *International Brotherhood, etc. v. International U., etc.*, 106 F. (2d) 871 (C. C. A. 9th), where Norris-LaGuardia Act was held applicable to representation disputes.

conform to the requirements of section 9 of the Norris-LaGuardia Act (29 U.S.C.A. § 109), which provides: "Every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in * * * findings of fact made and filed by the court". The evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, * * *.

* * * *

It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of section 2, Ninth, of the Railway Labor Act (45 U.S.C.A. § 152, subd. 9), authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act.

If the basis for the exception to the Norris-LaGuardia Act recognized in the *Virginian* case was the fact that the injunction was in furtherance of a specific requirement of the Railway Labor Act, a subsequent enactment, Paragraph 8 of the complaint in the case at bar must be regarded as within the exception. While Paragraph 8 seeks to restrain the carrier from treating with a representative which for the purpose of this question must be regarded as having

been designated in violation of the Railway Labor Act, it is in furtherance of Section 2, Fourth, which guarantees employees "the right to organize and bargain collectively through representatives of their own choosing," and which provides that "the majority of any craft or class of employees shall have the right to determine who shall be representative of the craft or class for purposes of this act." If the Petitioners' interpretation of Section 2, Fourth, is accepted as the correct one, the action of the Board will, in the absence of the relief sought, wrongfully deprive the Switchmen's Union of rights guaranteed by this paragraph.

It is true that the complaint in the instant case does not allege as did the complaint in the *Virginian* case that the carrier had refused to treat with the Switchmen's Union. But the facts alleged do show clearly that the New York Central reasonably can be expected to cease treating with the Switchmen's Union and commence bargaining with the Brotherhood as directed by Section 2, Ninth, unless restrained, if the certification of the Board is allowed to stand. It can also be assumed that the New York Central will honor its contractual obligations and continue to bargain with the Switchmen's Union as theretofore if not required to treat with the Brotherhood.

Moreover, it is clear from its text that the Norris-LaGuardia Act was not intended to apply to cases of this character. Its declared purpose in Section 2 states that the employee

> * * * shall be free from the interference, re-

The obligation is also in furtherance of Section 2, First, which makes it the duty of carriers to make and maintain agreements concerning rates of pay, etc. From the facts alleged in the complaint, it may reasonably be anticipated that the New York Central would not maintain its agreements with the Switchmen's Union after the Brotherhood had been certified as the representative of all its yardmen. The *Virginian* case, *supra*, recognized that the provisions of Section 2, Fourth, were enforceable by the Courts and permitted a certification to be challenged by the carrier on the basis of the provisions in this Section.

straint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 4 shows that the Act was intended to protect *labor* in its various activities. Sections 7 and 9 also contain requirements which can have no application to this type of proceeding and with which it would be impossible to conform.

The legislative history is to the same effect. The Senate Committee Report (Sen. Rep. No. 163, 72d Cong., 1st Sess., p. 25) explained that the main purpose of the definitions in Section 13

> is to provide for limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.
>
> The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable.

During the course of debate on the bill in the Senate, Senators Norris, Blaine and Wheeler, who were supporting the measure, denied that it would be applicable to suits brought by employees to enforce their rights under the Railway Labor Act. (75th Cong. Record. Vol. 75, Part 5, pp. 4936-4937.)

In conclusion, it should be emphasized that the

courts have entertained many suits of this character since the Board was granted powers in the 1934 amendment to determine jurisdictional disputes, and there is only one reported case where the Norris-LaGuardia point has been raised or considered.[*] Unless there are compelling reasons for upsetting this past procedure for reviewing the validity of Board action under Section 2, Ninth, we believe that it should be continued as heretofore. To make the Norris-LaGuardia Act applicable in these cases may well leave an aggrieved labor organization without any adequate judicial remedy.

II

THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE BOARD'S CERTIFICATION

There would seem to be two aspects to the question whether the district court had jurisdiction to review the Board's certification—the first being whether a certification by the Board is conclusive both as to the facts and the law and wholly immune from judicial review, and the second being whether the district court could, in the proper exercise of its equity jurisdiction, entertain this particular suit.

1. A certification issued by the Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act,

[*] *Association of C. E., etc. v. Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152 (C.C.A. 7); *Brotherhood of Locomotive Firemen, etc. v. Kenan*, 87 F. (2d) 651 (C.C.A. 5.), certiorari denied, *sub nom, Grand International Brotherhood v. Kenan*, 301 U. S. 687; *Brotherhood of R. R. Trainmen v. National M. Board*, 88 F. (2d) 757 (App. D. C.); *National Federation of Ry. Workers v. National M. Board*, 110 F. (2d) 529 (App. D. C.), certiorari denied, 310 U. S. 628; *Order of Ry. Conductors v. National Mediation Board*, 113 F. (2d) 531 (App. D. C.); *Brotherhood of R. R. Trainmen v. National M. Board*, 135 F. (2d) 780 (App. D. C.); *cf. Brotherhood of Railroad Shop Crafts, etc. v. Lowden*, 86 F. (2d) 458 (C.C.A. 10), certiorari denied, 300 U. S. 659; *Nord v. Griffin*, 86 F. (2d) 481 (C.C.A. 7), certiorari denied, 300 U. S. 673; *Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co.*, 39 F. Supp. 876 (N. D. Ohio).

[*] *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. D. Ga.)

is definitive of enforceable rights and duties. Such a certification imposes upon the carrier the affirmative obligation to treat with the representative certified; it confers upon the representative chosen by the majority of employees the exclusive right to bargain for all the employees, and it prohibits the minority from bargaining as a group with the carrier. *Virginian Railway Co. v. System Federation, supra.* Certainly an act of a public body that so directly affects rights of persons and property is reviewable in the courts.

The fact that the Mediation Board has no authority to enforce the rights and duties defined by its certification does not deprive the courts of jurisdiction to review such a certification. The Supreme Court has held that determinations which establish rights are judicially reviewable even though not in the form of an order. *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177; *Utah Fuel Co. v. National Bituminous Coal Com'n.*, 306 U. S. 56. See also, *Rochester Telephone Corp. v. United States*, 307 U. S. 125; *Federal Power Commission v. Pacific Power & L. Co.*, 307 U. S. 156. Nor does the fact that the Railway Labor Act contains no provision for judicial review of Board certifications manifest a legislative intention that such certifications shall be conclusive upon the courts. In *Shields v. Utah Idaho Cent. R. Co., supra*, a determination by the Interstate Commerce Commission pursuant to Section 1; First, of the Railway Labor Act was collaterally attacked and, despite the absence of any provision in the

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In *American Federation of Labor v. National L. R. Board*, 308 U. S. 401, while the Court held that a certification of the National Labor Relations Board is not a final order subject to review in a circuit court under Section 10(f) of the National Labor Relations Act, the opinion implies that a certification which has conferred legally enforceable private rights may be reviewable in the district court under Section 24 of the Judicial Code. In *Pittsburgh Plate Glass Co. v. National Labor R. Board*, 313 U. S. 146, a certification by the National Labor Relations Board was held subject to challenge when a complaint of unfair practices is predicated on that certification.

Act for review of such a determination, the Court reviewed it in the same manner as any other order of the Commission is reviewed.

In the *Virginian* case, the Supreme Court reviewed the validity of a certification by the Mediation Board which had been challenged in a suit against the carrier, and the lower federal courts have reviewed such certifications to the same extent that determinations of other administrative tribunals are judicially reviewed.*

In the instant case petitioners alleged that in issuing the certification in question the Board committed errors of law, and it is petitioners' view that the district court may review the certification to the extent of determining the validity of that allegation.

2. Assuming that the district court may review a certification by the Board, at least to the extent of determining whether it is predicated upon an error of law, it must next be considered whether it was within the jurisdiction of the district court to entertain this particular suit.

It was established in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, and *Virginian Railway Co. v. System Federation, supra*, that the deprivation of the right to bargain as exclusive craft representative results in irreparable injury and warrants equitable relief. Under these decisions it is not to be doubted that the district court had jurisdiction in so far as this suit relates to the carrier and the competing union. Ingenious reasoning has been suggested

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* See, e. g., *Brotherhood of R. R. Trainmen v. National M. Board*, 88 F. (2d) 757 (App. D. C.); *National Federation of Railway Workers v. National M. Board*, 110 F. (2d) 529 (App. D. C.), certiorari denied, 310 U. S. 628; *Order of Ry. Conductors v. National Mediation Board*, 113 F. (2d) 531 (App. D. C.); *Brotherhood of Locomotive Firemen, etc. v. Kenan*, 87 F. (2d) 651 (C.C.A. 5), certiorari denied *sub nom. Grand International Brotherhood v. Kenan*, 301 U. S. 687; *Nashville, C. & St. L. Ry. v. Railway Employees' Dept., etc.*, 95 F. (2d) 340 (C.C.A. 6), certiorari denied, 303 U. S. 649; *Brotherhood of Ry., etc. v. Nashville, C. & St. L. Ry. Co.*, 94 F. (2d) 97 (C.C.A. 6); *Brotherhood of Ry. & S. S. Clerks, etc. v. Virginian Ry. Co.*, 125 F. (2d) 853 (C.C.A. 4).

to reach the conclusion that in so far as this suit is one against the Board and its members, however, it is a suit brought against the United States without its consent and could not be heard by the district court. This reasoning proceeds substantially as follows:

> a. The immunity of the United States from suit extends to the Mediation Board. Congress has not consented that the Board should be subject to suit and the district court could not, therefore, entertain a suit against the Board.
>
> b. Governmental immunity from suit does not extend to, and suits may be brought against, members of the Board when they are acting or threaten to act outside the scope of their lawful authority. Such suits are suits against the members in their individual capacities.
>
> c. In suits brought against Board members as individuals, equitable relief is available only if their conduct is at the time of the suit such as satisfies the requisites of equity jurisdiction.
>
> d. Since the Board has no power to enforce its certifications, if members of the Board have acted outside the scope of their authority and issued an illegal certificate, no suit will thereafter lie against them in equity because they can engage in no further conduct irreparably injurious to employees prejudiced by the certificate issued. Nor can the court in such a case annul and set aside the certification, because the certification is the official act of the Board and a decree directly affecting the certification is precluded by the ban upon suits against the United States.

Under this reasoning, employees prejudiced by an illegal certification—in this case, the Switchmen's Union—may enjoin Board members from issuing such

a certification, but, once the certification has been issued, the Board members are beyond the reach of equity and their illegal act stands effective.

This line of reasoning misconceives the character of petitioners' suit. Petitioners are not seeking to restrain the Board or the Board members from acting, nor are they asking that the court require them to act. Rather petitioners are asking the court to set aside what is alleged to be an illegal and unauthorized act of the Board members. The petitioners' suit is analagous to a suit for the cancelation of an instrument; it requests the court to act upon the *res*.

It is suggested that such a suit nevertheless is a suit against the United States because a certification is the official act of the Board *qua* Board and a decree aimed directly at such a certification is tantamount to granting relief against the United States. But, while a *valid* certification is the official act of the Board, an illegal certification manifestly is not the official act of the Board. A decree aimed directly at an illegal certification cannot, therefore, be deemed equivalent to a decree entered against the United States. That the relief sought may properly be granted by the district court is confirmed by *Tiger v. Twin State Oil Co.*, 48 F. (2d) 509 (C.C.A. 10th), wherein the court held that (512):

> Courts of equity have power to set aside actions of administrative boards or of inferior courts which are in excess of their jurisdiction.

But even if we assume for purposes of argument that petitioners are, in effect, requesting the court to order the Board members to withdraw the certification, still petitioners' suit is not one against the United States. The contrary conclusion rests upon reasoning which erroneously assumes that the unlawful action of the Board members ceases once the certificate is is-

sued. If, in issuing or threatening to issue an illegal certification, the Board members discharge their statutory duties in an unlawful manner and lose their immunity from suit, their failure to withdraw an illegal certification is equally improper and unlawful. By suffering an illegal certification to remain outstanding, they are unlawfully discharging the duties of their office and a suit should lie against them to require that they discontinue to discharge their duties improperly. Moreover, injury continues to be inflicted by an illegal certification so long as it is permitted to stand. In the instant case, until the certification is annulled the Switchmen's Union is deprived of the right to bargain collectively for the craft and is without an adequate remedy at law for this irreparable injury. In other words, the Board members are not lawfully discharging the duties of their office so long as they permit an illegal certification to stand, and so long as such certification is outstanding the Switchmen's Union continues to suffer irreparable harm. Clearly, we think, the conduct of the Board members—while negative in character—satisfies the requisites of equity jurisdiction.

In this connection, we call attention to the decision in *Garfield v. United States*, 211 U. S. 249. In an opinion by Mr. Justice Day, the Supreme Court held in a mandamus suit against the Secretary of the Interior that a Secretary who has acted outside the authority of his office may be ordered to take such steps as will restore the prejudiced parties to the position they would have been in had he not acted beyond his authority. The rationale of the decision is that such an order is one against an individual whose unlawful conduct has removed his cloak of official immunity and brought him within the reach of legal process. Cf. *West v. Standard Oil Co.*, 278 U. S. 200.

III

NO REPRESENTATION DISPUTE EXISTED WHICH INCLUDED ALL THE YARDMEN OF THE NEW YORK CENTRAL RAILROAD COMPANY AND A CARRIER-WIDE ELECTION TO DETERMINE A SINGLE REPRESENTATION WAS INVALID

At the outset, we wish to emphasize that the jurisdiction of the Board in representative cases is limited to those where a "dispute shall arise among a carrier's employees as to who are the representatives of such employees * * * ". (Sec. 2, Ninth)

On July 2, 1942, when the services of the Board were invoked, the Brotherhood held contracts covering all the yards of the Boston & Albany, the New York Central-Lines East, the Big Four, the Toledo & Ohio Central Lines, all yards of the Michigan Central east of the Detroit River, and nine yards of the New York Central-Lines West, and there is nothing in the record which discloses that any of the yardmen covered by such contracts disputed the right of the Brotherhood to represent them. (R. 79, 80, 110-114, 152.)

The Switchmen's Union held contracts covering all yards on the Michigan Central west of the Detroit River, including the South Bend Transfer Crews, and on all of the yards of the New York Central-Lines West, except the nine yards covered by the Brotherhood contracts. (R. 79, 80, 152.) There is no conclusive evidence in the record which discloses that any of the yardmen covered by the contracts of the Switchmen's Union questioned or disputed the right of such union to represent them.[10]

[10] While the record shows that the Brotherhood claimed representation authorizations from 479 yardmen on the Michigan Central and 774 yardmen on the New York Central-Lines West, it does not disclose whether

The Switchmen's Union has represented yardmen on the lines now known as New York Central-Lines West, since long prior to December 1914, when the lines were a separate corporate carrier under the name of the Lake Shore and Michigan Southern Railway. Likewise, the Switchmen have had contracts covering the yardmen on the Michigan Central Railroad at Detroit and west since 1909. This was the situation as it existed at the time of the passage of the Act, May 20, 1926, and when it was substantially amended, June 24, 1934. (R. 151-152.)

The services of the Board were invoked by the Brotherhood because of an alleged dispute between the representatives of the Brotherhood and Switchmen's Union as to what constituted the basis for the representation of yardmen employed on the several lines of the New York Central System, under the provisions of the Act. (R. 83, 28, 29, 47-49.) In the proceeding before the Board, the Brotherhood contended that all the yardmen on the New York Central Railroad System should be voted at an election to determine a single representation for such yardmen. (R. 83, 29, 30.) To use the language of the Board (R. 28), the dispute raised by the contention of the Brotherhood was

> whether all of the yardmen together in the service of the Railroad Company should be considered the basis for representation within the meaning of the Act or whether the yardmen should be permitted to continue to designate representatives by separate parts of the Railroad Company substantially as reflected by the agreements covering yardmen in effect between the Switchmen and various component lines or roads of the Railroad Company.

any of these claimed authorizations came from yardmen covered by Switchmen's contracts. In this regard it should be noted that a comparison of the claimed authorizations of the Brotherhood with the votes cast for that organization shows the claims were exaggerated by more than 13 per cent. (R. 35, 49.) *Moreover, the Board did not rely upon the authorizations obtained from yardmen covered by Switchmen's contracts, if any, as basis for asserting its jurisdiction.* (R. 83, 28, 29, 47-49.)

This is the only dispute to which the Board refers. (R. 28, 29, 47-49, 76-81.)

We believe that the term "dispute," as used in the Act, describes a situation where employees are dissatisfied with their own representation—not where they are dissatisfied with the representation received by some group other than their own which is covered by a valid agreement. *A group of employees satisfied with their own representation cannot reasonably be said to have a representation dispute within the meaning of the Act with another group of employees who are satisfied with their representation.*

The language of Section 2, Ninth, supports petitioners' position. It refers to dispute "among * * * *employees*" and directs the Board to certify the individuals or organizations that have been designated to represent "*the employees involved in the dispute.*" (Emphasis ours.)

The real dispute was between two organizations over the question of what constituted the appropriate bargaining unit and we doubt whether it operated to give the Board jurisdiction over all of the yardmen of the New York Central.

A dispute arises out of the claim of one or more employees. No organization can raise a dispute over its rights—for an organization has no rights *per se*. One employee or one hundred employees on the Boston & Albany could not claim to have a dispute as to whether *other* employees on the Michigan Central were properly represented. They could not involve themselves in a dispute raised by another employee over his representation, unless his dispute threatened to *change* their representation.

The Brotherhood had no power to create a dispute but only to represent employees who had a dispute. The Brotherhood had no power to bring into a repre-

sentation dispute employees who had no dispute. Nor had the Board any such power.

If a representation dispute was presented because of the contention of the Brotherhood, it was a dispute as to who was entitled to represent the yardmen on the Michigan Central and New York Central-Lines West, who were then covered by a Switchmen's contract and should have been resolved by an election restricted to the yardmen covered by such contracts. The Board, however, held that the alleged dispute should be determined by an election in which all the employees of the craft, or class, of yardmen in the service of the New York Central Railroad System should be voted. (R. 27-49.) *The Board did not purport to exercise discretion in reaching its decision. The Board said it reached its conclusion as a matter of law and had no discretion in the matter.* (R. 46, 4th and 5th full pars.)

Assuming there was a representation dispute within the meaning of Section 2, Ninth, the question to be decided is whether it was proper for the Board to resolve it by an election in which all the yardmen of the New York Central System were voted.

The major mistake of the Board was in not realizing that its jurisdiction to act depends wholly upon the existence of a dispute "among a carrier's employees," and that in settling such a dispute the Board obtains jurisdiction and can exercise jurisdiction only over the employees *involved* in the dispute. The Board has no arbitrary power to hold that employees working on the Boston & Albany under a contract negotiated by the Brotherhood, who have no dispute whatsoever with the Railroad over their representation, can be made parties to a dispute, if one existed, of employees working on the Michigan Central and New York Central-Lines West, under contracts negotiated by the Switchmen's Union.

When the Act was enacted in 1926 there was a provision giving the employees the right to organize and bargain collectively through representatives of their own choosing, and any interference, influence or coercion by the carrier over the choice of representation was forbidden. But the Act did not provide for action by the Board to hold an election to settle a dispute over representation, nor was there any provision giving the majority of a craft or class of employees the right to determine the representation of the craft or class. By 1934 the need for certain revisions of the Act became apparent and extensive amendments were passed by the Congress and approved June 21, 1934. (48 Stat. 926.) Among these amendments were provisions for action by the Board to settle a dispute over representation; and Section 2, Ninth, expressly created the duty and authority of the Board in this regard.

It provides:

> If any *dispute* shall arise *among a carrier's employees* as to who are the representatives of *such employees*, designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Board, upon request of either *party to the dispute*, to investigate *such* dispute and to certify to both parties in writing within thirty days after the receipt of the invocation of its service, the name or names of the individuals or organizations that have been designated and authorized to represent *the employees involved in the dispute*, and certify the same to the carrier. (Emphasis ours.)

This paragraph further provides that the Board shall be authorized "to take a secret ballot *of the employees involved.*" (Emphasis ours.)

The Board was given no authority to enlarge a dispute to cover employees who are not involved in the

dispute. At the outset it is provided: "If any *dispute* shall arise *among a carrier's employees* as to who are the representatives of *such* employees." Then it is made the duty of the Board to certify the name or names of individuals or organizations "that have been designated and authorized to represent *the employees involved in the dispute.*" Then the Board is authorized to "take a secret ballot of *the employees involved.*" (Emphasis ours.)

The Board attempted to justify its ruling and was sustained by the lower courts, on the basis of Section 2, Fourth, which provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act".

The Board and the courts below took the position that the "majority of any craft or class of employees" must mean the majority of all the workers in a particular craft or class who were employed by a single carrier. But we believe that this construction of the Act was not justified because the very language of Section 2, Ninth, authorizing the Board to hold an election, limited the authority of the Board, and limited participation in the election, to the employees "involved in the dispute". It was not only unnecessary but absolutely contrary to fact for the Board to take the position that all the employees of one craft, that is, all yardmen of the New York Central Railroad, were involved in a dispute over representation when there was not the slightest question that, as a matter of fact, a large majority of the yardmen had exactly the representation they desired through the Brotherhood, which no one was disputing. There was, furthermore, no evidence before the Board that any substantial number of yardmen working under the Switchmen's Union contracts were dissatisfied with that representation. How-

ever, if some of these yardmen, members of the Brotherhood, but working under contracts held by the Switchmen's Union, *did* raise a dispute over their representation, then, as a matter of simple fact, no employees would be involved in that dispute except those working under the Switchmen's Union contracts.

The Board and the courts below seem to have assumed that all employees of a particular craft or class who are employed by a single carrier are immediately "involved in the dispute" when any group of such employees desire a change in their representation. But the provision of Section 2, Fourth, is *not* that "the majority of any craft or class of employees" *who are employed by a carrier* "shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act". On the contrary, if we read ahead into Paragraph Ninth, it is evident that the words which are implied, but omitted, in Paragraph Fourth are the following italicized words: "The majority of any craft or class of employees" *who are involved in a dispute* "shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act".[11]

This reasonable construction of the Act, so as to make the provision for an election consistent with the repeatedly declared right of self-organization, is in harmony with the dissenting opinion of Mr. Justice Rutledge. It is unquestionably true, as the dissenting opinion points out, that the Board must decide "who may participate in the election"; and, obviously, "that decision is not to be made arbitrarily or uniformly in all cases without regard to the varying conditions pre-

[11] The opinion of the Court of Appeals appears to concede that the term "craft or class" has no geographical connotation when it states: "We, therefore, deny that Congress intended any geographical or divisional connotation to be given to the term 'craft or class'; it was intended only in the occupational or functional sense and not in the fractional, divisional or regional sense." (R. 174.)

sented". In other words, as we contend, the Board must determine what employees are "involved in the dispute" and, on that basis, decide who may participate in the election.

We think it would be an arbitrary decision if the Board were to hold that all employees of a craft were involved in a dispute over representation despite evidence that the vast majority of the employees was entirely satisfied with, and not involved in any dispute over, their representation. However, we can certainly agree with the dissenting justice that this is a matter for the Board to decide.

If a dispute arises between a carrier and employees who are not covered by an existing contract and who have no existing representation, and if a certain number of employees of a particular craft or class claim to have designated a particular organization as their representative, then the carrier may properly take the position of questioning whether a majority of all the workers of one craft or class who are employed by the carrier desire the representation claimed. Or there may be two or more organizations claiming members of the same craft or class and the carrier may question whether any one organization represents a majority of the craft or class. Under these circumstances there is no collective bargaining unit which has been established by the self-organization of the employees, and the Board may, therefore, properly regard all the workers of the craft or class concerned who are employed by the carrier as "involved in the dispute".

An entirely different situation is presented where there is an existing organization of employees which has a contract with the carrier covering a specific group of employees, and where a dispute arises as to whether the organization holding the contract, or some other organization, is duly authorized to represent the em-

ployees whose rates of pay, rules, and working conditions are fixed in the contract. When such a dispute arises and is presented to the Board, it should be apparent that *the only employees involved* in that dispute are the employees covered by the existing contract.

The Board also argued that its decision was in accordance with the interpretation placed on the statute in its First Annual Report and consistently followed thereafter, and cited authority for the proposition that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315. The policy, however, of the Board in this regard has not been consistent: As pointed out by Justice Rutledge, they have been following two diametrically opposite policies in the administration of the Act. (R. 191, 192.) When there is no disagreement as to the bargaining unit, the Board respects the right of self-organization and determines representation disputes on the basis of the bargaining units established theretofore. When the bargaining unit, however, is a matter of dispute, it has been the practice of the Board to treat the unit as carrier-wide. (R. 41-46.) With respect to the Board's past practice, Justice Rutledge had this to say:

> So long as the employees can organize themselves and do so, without entrenching upon each other's or the public domain, the Act preserves their right and the Board has respected it. That it has done so, in my opinion, is not because it has closed its eyes to the policy of the Act for the reason that its jurisdiction has not been invoked, as would be true if the statute requires carrier-wide units as a matter of law; but is rather because, to this extent, it has observed and followed both the letter and the policy of the law. The statute obviously was not intended

to prescribe two conflicting policies, one for application when the persons affected agree, the other to be applied when they disagree. So to construe it would turn the policy to be applied upon the factor of agreement alone, which of course only would invite disagreement. (R. 191, 192)

The great railroad systems such as the New York Central, Pennsylvania, and the Southern Pacific (to mention only a few) are the product of consolidations of many small railroads. They operate over such vast stretches of territory, involving so many different operating and climatic conditions, that separate operating divisions are inevitable and necessary to efficiency. Some of these are essentially the maintenance of earlier separate companies. Some of them are the results of a later division of managerial powers. But the record of the proceeding before the Board is replete with evidence of the fact that employees may belong to the same craft, but work on different sections of a railroad system, hundreds of miles apart, subject to localized management, dealing with local conditions, working under contracts that, because of local conditions or historical development, vary in their terms and application and that such employees when they work, for example, on the Boston & Albany operating from Albany east, will not be in any real way *involved* in a dispute which may arise on the Michigan Central Railroad or New York Central Lines West.

It would simply be doing violence to the plain meaning of plain words to say that the yardmen members of the Brotherhood operating under a separate contract on the Boston & Albany part of the New York Central System are involved in a dispute that may arise among the yardmen operating under a separate contract negotiated by the Switchmen's Union and maintained with the Michigan Central part of the System. As a

practical matter, the Board could not hold that the Michigan Central yardmen *east* of the Detroit River, the Canadian workers, were *involved* in the dispute. Yet these workers were covered by a contract with the Michigan Central management located in Detroit. As Mr. Walber testified: "So far as the operating department is concerned, the negotiations are conducted on the several portions of the properties." The Boston & Albany yardmen, negotiating with the General Manager of that railroad, might be interested in negotiations between the yardmen and the General Manager of the Michigan Central property in Detroit, but they would not be involved in those negotiations and they could not be *involved* in a dispute over representation of the employees working under and negotiating a separate contract.

The Act was designed to promote industrial peace. It was not passed to encourage labor strife. But the legal ruling announced by the Board would cause serious and nationwide labor disturbances. It constitutes an invitation to the reaching union with the larger membership to absorb and destroy the union with the smaller membership—wherever the present representation of a craft or class of a carrier is shared by two or more organizations. It was not the intention of the Act to penalize smallness and reward bigness in this manner. There is nothing in the legislative history or text of the Act to justify this drastic ruling of the Board.

The election held in which all the yardmen employed by the entire New York Central Railroad System were made eligible to vote to settle alleged disputes in which few, if any, of them were shown to be involved, was an improper election. The Board made an improper certification as the result of such election. Petitioners are entitled to have this invalid action set aside.

IV

THE ACTION OF THE BOARD IN VOTING ALL THE YARDMEN OF THE NEW YORK CENTRAL RAILROAD SYSTEM TO DETERMINE A SINGLE REPRESENTATION CONSTITUTED (a) AN UNLAWFUL LIMITATION UPON THE "FREEDOM OF ASSOCIATION AMONG EMPLOYEES," AND (b) AN UNAUTHORIZED INTERFERENCE WITH THE RIGHT OF EMPLOYEES TO DESIGNATE AND BARGAIN COLLECTIVELY THROUGH REPRESENTATIVES OF THEIR OWN CHOOSING.

1. *The Statute.*

The history of the Act [12] will demonstrate that the Board has acted in violation of the intention of the Congress in the original enactment and amendment of the Act.

The Act as presented to Congress was the joint product of railway management and railway labor. A very large majority of the railway executives, representing a large percentage of the railway mileage, joined with the representatives of all the standard railroad labor organizations in drafting the bill, which was finally enacted into law with practically no change. It was repeatedly urged during the passage of the bill that this joint product should be sanctioned by the Congress (which it was) as the effort of management and labor to work out a program to preserve industrial peace in this vital industry.[13]

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[12] The history of the Railway Labor Act is briefly reviewed in *Order of Ry. Conductors v. National Mediation Board*, 113 F. (2d) 531 (App. D. C.); *Brotherhood of R. R. Trainmen v. National Mediation Board*, 88 F. (2d) 757 (App. D. C.); and *Brotherhood of Ry., etc. v. Nashville, C. & St. L. Ry. Co.*, 94 F. (2d) 97 (C.C.A. 6th). These cases are hereafter discussed in the argument.

[13] House Committee Hearings on H. R. 7180, January 26 and 29, 1926, pp. 9, 107-110, 115-116.

Difficulties in devising a practical program were very great. Among these difficulties was the fact that many of the railroad labor organizations had overlapping jurisdictions; and craft lines were not easily drawn. For example, engineers and firemen were promoted and demoted as traffic fluctuated, so that many members of the firemen's organization worked as engineers, at least part of the time. In the same way, conductors and trainmen moved up and down. The various classes of employees covered by contracts of the clerks' organization had such varied occupations that it would be difficult to draw a craft line covering the jurisdiction of that organization. A station agent might be a telegrapher or he might not be. A train dispatcher might be classified as a "telegrapher". Furthermore, large numbers of railway employees either were not organized at all or were organized in so-called company unions, which were often associations following no craft lines. Some independent organizations were not company-controlled, but were not affiliated with any national bona fide labor organization.

It would have been impractical and probably illegal to have laid down lines of craft or class in the bill, and thereby to compel employees to join or organize limited craft or class organizations in order to exercise rights of collective bargaining. *So the underlying principle written into the Act was the right of self-organization.* This intent was written into Section 2 of the Act, as amended, and provides that one of the general purposes of the Act is

> to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employeees to join a labor organization; * * *.

The same intent is also expressed in Section 2, para-

graphs Third and Fourth, which, in part, read as follows:

> Third. Representatives, for purposes of this Act, shall be designated by the representative parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in his choice of representatives * * *.
>
> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, * * *.

An employee can join two labor organizations if he wishes, and it is common knowledge that many employees are members of more than one such organization.

The jurisdiction and powers of the employee organizations were not defined in the Act. Representatives might be chosen by "craft or class." Moreover, a class of employees might include workers of more than one craft, or a class of employees might include only a group of the workers of one craft or class. That the jurisdiction, powers, and manner of organization of labor organizations are in no wise limited clearly appears from the proviso to Section 1, Fifth, which reads as follows:

> Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts

according to which railway employees may be organized by their voluntary action, *nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act* or by the orders of the Commission. (Emphasis ours.)

The provision quoted is a proviso to the definition of the term "employee" and was adopted by the Congress because there were certain employees commonly described as "subordinate officials" who were not really officials, in the sense of being a part of management, but, rather, were essentially employees. To solve this problem the Fifth paragraph of Section 1 was written into the original Act and remains unchanged, which provided for a definition by orders of the Interstate Commerce Commission of the work of employees or subordinate officials. It was immediately apparent, however, that a sweeping power of this character might give the Interstate Commerce Commission authority to interfere with the self-organization of the employees. Therefore, the proviso was added."

The foregoing proviso is peculiarly important in the present case, yet, strange to say, its importance was

"The purpose of its adoption supports the clear meaning of the text, which was explained in the testimony of Mr. Donald Richberg before the House Committee on Interstate and Foreign Commerce, who, as counsel of all the labor organizations, had been one of the principal draftsmen of the bill. After quoting the proviso, Mr. Richberg made the following explanation:

> In other words, even by importing into this Act the orders of the Interstate Commerce Commission and giving it authority in the future to classify occupations, it is specifically provided that that shall not define or affect in any way craft organizations or any other form of organization. Therefore, how the employees are to be represented, in what groups, who are to be their representatives, are all to be determined by the employees themselves, quite regardless of any artificial barriers or boundaries that might be set up in the law. There are no such barriers set up. * * * There is absolutely nothing in this Act that gives any special privilege or aid to an organization except this, and that is if an organization is of the type that the employees themselves want, it will strengthen that organization, because they have a right here to be represented as they see fit. If it is of the type that they do not want, it will weaken the organization. In other words, it must stand on its own merits. (House Committee Hearings on H. R. 7180, January 26, 27, 1926, p. 64.)

apparently overlooked in the consideration of this matter by the Board. The Switchmen's Union, as it was organized long prior to the passage of the Act and as it existed at the time of the passage of the Act, organized employees essentially by yards rather than by a railroad system or an operating division. Yard service is a local service, employees being particularly interested in local conditions, whereas other transportation employees, engineers, firemen, conductors, and trainmen work over an operating division of a railroad. Yardmen working for the Michigan Central, before it became a part of the New York Central System and after it became a part, had comparatively little interest in yard service in other sections of the country, except as any labor organization is interested in wages and working conditions for its class of labor, whether working on the same railroad system or on another railroad.

The practical effect of the ruling of the Board is to deny to railroad employees the right to maintain an organization on a railroad and to hold a contract covering a portion of a railroad system unless that organization desires and is able to extend its membership over the entire system, so that it can at all times command a majority vote of all employees doing similar work.

That the ruling of the Board, if sustained in law, will have far-reaching consequences of a most serious character, by interfering with long-established custom and precedent in railway organization and representation, is made graphically certain from the testimony of Vice-President Walber of the New York Central System. He recites a long list of agreements covering practically all railroad employments. He points out that practically all the organizations of railway labor have *separate* agreements in effect on different parts of the New York Central System. *In many instances more*

than one organization represents the same class of employees in different parts of the system. For example, agreements covering the work of train dispatchers include separate agreements with the American Train Dispatchers Association on the Boston & Albany, the New York Central and the C. C. C. & St. L. Railway, whereas an agreement covering this same work on the Michigan Central is with the Order of Railroad Telegraphers. The work of yardmasters is covered by agreements on the New York Central, excepting Ohio Central Lines, and on the Michigan Central Railroad, which were made with the Railroad Yardmasters of North America. On the C. C. C. & St. L. Railway there is an agreement in effect with the Big Four System Yardmasters Association. On the Ohio Central Lines the Brotherhood of Railroad Trainmen represents the yardmasters. (R. 148-155.)

Mr. Walber also points out that "In the engine and train service organizations the general practice is to have committees cover territories co-extensive with the jurisdiction of General Managers, and the prevailing practice has been to have separate agreements co-extensive in scope with the jurisdiction of General Managers. Each agreement contains certain provisions peculiar to the territory covered thereby." (R. 150.)

The conditions on the New York Central, as to employee organizations and agreements, are typical of those prevailing throughout the United States on the great railroad systems such as Pennsylvania, Baltimore & Ohio, Southern Railway, Southern Pacific, Atchison, Topeka & Santa Fe, Chicago, Milwaukee & St. Paul, etc., etc. The effect of the ruling of the Board is to destroy a valuable right of self-organization of the employees. To maintain their agreements their organizations will be compelled to create or maintain an organization covering an entire railroad system so that

they can at all times obtain a majority vote of all employees of one craft in support of their representation. The inevitable effect will be the gradual extinguishment of many smaller organizations and the forcing of the handling of all labor relations on a large scale basis.

Whether the Congress could write a law classifying railroad employments and compelling all employees of a railroad system of one class to vote for representation through one organization is a serious question. But there is no doubt that up to date the Congress has not written any such laws; and the employees and their organizations, who are jointly responsible for railroad management for the provisions of the present law, never asked the Congress to write such a law. A large number of them intervened in the proceedings before the Board in the present case, objecting to the distortion of the law by the Board in attempting to exercise an authority never conferred upon that Board.[*]

2. *The Cases.*

The decision of the Court of Appeals in this case is in conflict with other decisions of this and another Court of Appeals. It has been consistently held heretofore that the underlying principle written into the Railway Labor Act was the right of self-organization.

In the case of *Brotherhood of R. R. Trainmen v. National M. Board*, 88 F. (2d) 757 (App. D. C.), which involved a dispute on the Norfolk & Western Railway as to the representative of the road conductors, the Board limited the eligible voters to the regularly

[*] The Board argued, and the majority of the Court of Appeals agreed, that the legislative history as shown by the statements of Commissioner Eastman to the Congressional Committees in explanation of the 1934 amendments, justified the Board's position. (R. 178) We submit, however, that such inferences as may be drawn from these statements cannot prevail against the many other opposite inferences of compelling nature which must be drawn from the legislative history—and we refer the Court to the full discussion on this point contained in the dissenting opinion. (R. 183-193)

assigned conductors and eliminated the brakemen, who to some extent were employed as conductors during seasonal rushes. The brakemen, represented by the Brotherhood, claimed the right to vote for the representation of conductors. This claim was denied by the Board, and the Order of Railway Conductors won the election on the vote of the regularly assigned conductors. The Court held in part as follows:

> The general purpose of the Labor Act was to promote peaceful and conciliatory consideration of labor disputes, and especially to secure the right of collective bargaining through a representative chosen by a majority of the employees in a particular craft or class. It is not going too far to say that the basic and underlying purpose of the Act was to insure representation *in accordance with the established custom* to those employees *whose interests are involved*. But the Act leaves uncertain the precise or exact meaning of the words "class or craft", and we think obviously for the reason that it was intended by Congress to adopt the designation of class or craft as determined by the *then current working agreement* between the Railroad and particular groups or classes of its employees. (Emphasis ours.)

The Court then cited and discussed Section 2, Seventh:

> We think it is obvious that how classes are to be formed and who shall compose them are matters left *to the employees themselves*, and so we think that by reference to the terms of the working agreement which the employees have made, is to be found at least some evidence of who are members of the class or craft covered by the agreement. The Board also recognizes that this is a criterion, for in its First Annual Report to Congress, after noting that the Act does not give it authority to define the crafts or classes, it says: "So far as possible the Board has followed the past practice of the employees *in grouping themselves* for representation

purposes and of the carrier *in making agreements* with such representatives." (Emphasis ours.)

The Court discussed the inclusion of ineligible employees in agreements and the haziness of the distinction drawn by the Board, and stated:

> In addition to this, it is charged in the Bill that the Board declined and refused to inform appellants of the facts upon which the Board based or made its designation or rule as to who were eligible to participate in the election on the grounds that this information was obtained through its examiner and should not be divulged. This, in our opinion, was wrong, for as was said by Mr. Justice Brandeis in *United States v. Abilene & S. R. Co.*, 265 U. S. 274, 288, 44 S. Ct. 565, 68 L. Ed. 1016, "Nothing can be treated as evidence which is not introduced as such."
>
> * * * But, as we have seen, the intent of Congress, in leaving undefined by the Act the personnel of the class authorized to choose a representative, was to adopt and confirm the grouping *as it then was recognized and established by mutual agreement of employees and carrier.* (Emphasis ours.)

So the case was remanded.

In *Brotherhood of Ry., Etc., v. Nashville, C. & St. L. Ry.*, 94 F. (2d) 97, decided in 1937 by the United States Circuit Court of Appeals for the 6th Circuit, there was a dispute over whether two classes of so-called "clerks" should be voted separately or jointly. There was a class of station clerks who had been organized for many years and had an agreement with the carrier. In 1934 the Brotherhood organized other classes of station workers and also some of the clerical employees. The Board voted the clerical employees and the other employees separately; and the clerical employees favored their own association by a majority vote, whereas the

other employees voted for the Brotherhood. The total of both ballots would have given a majority to the Brotherhood.

The Brotherhood sued for a mandatory injunction to compel the carrier to treat with it as the designated representative of *both* classes of employees. The relief was denied and the Circuit Court of Appeals affirmed the decision. The Court held that the intent of the Act was to preserve existing craft and classes of employees as units for collective bargaining, citing Section 1, Fifth, and Section 2, Fourth, and holding in part as follows:

> The terms "craft" or "class" are not defined. It is fair inference that the *Congress intended that collective bargaining groups already constituted and functioning were to be recognized*, and it is likewise fair inference that the terms were left sufficiently elastic to meet not only changing conditions but also varying existing conditions among the employees of carriers differing greatly in size, number of employees, intensiveness of their organization, and differences in its origin, scope, and development. (Emphasis ours.)

The Court held that the existence or non-existence of a distinct class or craft, as among the railroad's employees, was a question of fact, and the Board's conclusion that a craft does or does not exist was the finding of an ultimate fact, which must be supported by the evidentiary facts and the question as to whether substantial supporting evidence exists is one of law.

> Our analysis of the evidence indicates that the facts found (by the District Court) are fully supported by the proofs, and our consideration of the terms of the statute and its inherent design compels the conclusion that it *neither authorizes nor encourages nor commands the type of gerrymandering* that must inevitably follow the enforcement

of a certification which ignores the basic facts of *historical development*, similarity of employment, community of interest, and *well-defined group choice*. (Emphasis ours.)

We submit that the sentence last quoted applies with great force to the present situation, and it should be held in this case that the Act does not authorize or encourage or command the "type of gerrymandering" that was practiced to the detriment of the yardmen who were represented by the Switchmen's Union.

The *third case* is *Order of Ry. Conductors v. National Mediation Board*, 113 F. (2d) 581, decided in 1940 by the United States Court of Appeals for the District of Columbia. This was a suit by the Order of Railway Conductors to set aside a Board certification that the Brotherhood was entitled to represent yardmen on the Pittsburgh & Lake Erie. The District Court sustained the finding of the Board that yard conductors were a part of the craft or class of yardmen, and the judgment of the District Court was sustained on appeal.

This Court pointed out that the Act was intended not merely to protect independence and the right to organize, but also to settle disputes and to avoid interruptions, holding:

> Accordingly it aims not to compel the creation of new craft or class lines but to recognize the lines which are drawn in the industry.

The Court held that groups that have chosen to bargain as units may do so, and this is emphasized by the use of the broad term "craft or class" instead of the narrow term "craft". The Court finally cited the proviso of Section 1, Fifth, in the following language:

> The Railway Labor Act provides that "no occupational classification made by order of the Interstate Commerce Commission shall be construed to

define the crafts according to which railway employees may be organized by their voluntary action."

The reasoning of the foregoing opinion is directly applicable to the present situation. Throughout the railroad industry the organizations have consistently carried on collective bargaining, not only with single carriers but also with managerial divisions of a railroad system, and with parts of a system that once were, or remained, separate operating entities.[16]

The ruling of the Board in the present case does not aim to preserve existing conditions and existing labor relations and existing contracts, but will inevitably have the effect of disrupting existing conditions, relations and contracts. It will compel a chaos of reorganization, in which a labor organization, in order to survive, will be compelled to extend its jurisdiction over the entirety of any railroad or railroad system, which the Board may define as a single carrier. Railroad labor organizations will not be permitted longer to maintain separate contracts to cover different operating conditions, unless they have the numerical strength sufficient to enable them to write *all* the contracts covering *all* employees of one craft or class on the railroad.

The majority of the Court sought to distinguish these cases on the ground that they relate to the occupational rather than the geographical scope of the craft or class. We submit, however, that this distinction is untenable as shown by the reasoning in the dissenting opinion.

The dissenting opinion in expressing the position of appellants, petitioners here, stated that it "freezes rail-

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[16] See also *Brotherhood of R. R. Trainmen v. National Mediation Board*, 135 F.(2d) 780 (App. D. C.), decided the same day as the case at bar. Here the Court of Appeals, in an inconsistent ruling, upheld a ruling of the Board that no dispute within the meaning of the Act was involved where there was no question as to who is the representative of the craft or class.

way labor in the contractual mould of 1934". (R. 181, 182.) Acceptance of petitioners' position would not result in so static a situation. Petitioners contend that employees should be permitted to establish the bargaining unit in the exercise of their right of self-organization. Thus, whenever a group of employees covered by a contract desire to change their bargaining unit and combine with some larger unit, they may do so if a majority of the employees involved desire to make the change.

The ruling of the Board denies to the employees the right to organize themselves in local units for collective bargaining. It denies them the right to maintain existing contracts and labor relationships which antedate the enactment of the Act, and which are acceptable alike to the great mass of railway employees and to practically all railroad managers. The action of the Board, however well intentioned, was in fact the arbitrary assumption of a power and authority not granted to the Board by the act of its creation, and in violation of Section 1, Fifth, and Section 2, Fourth, (See *Brotherhood, etc., v. Nashville C. & St. L. Ry., supra.*)

CONCLUSION

We submit that the judgments of the lower courts should be reversed and the cause remanded to the District Court, with instructions to grant the relief prayed for in paragraphs 7 and 8 of the bill of complaint.

Respectfully submitted,

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APPENDIX

Excerpts from the Railway Labor Act

(Act of May 20, 1926, as amended by the Act of June 21, 1934, 45 U.S.C. 151-163)

TITLE I

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

* * * * * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * * * *

GENERAL PURPOSES

SECTION 2. (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly

settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall

be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to

the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * * * *